

EXHIBIT F

THE HONORABLE ROBERT J. BRYAN

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MARILYN MARTIN,
Plaintiff,

v.

TWIN CITY FIRE INSURANCE
COMPANY, THE HARTFORD
FINANCIAL SERVICES GROUP, INC., and
HARTFORD FIRE INSURANCE
COMPANY,
Defendants.

Case No. C08-05651-RJB

CLASS PLAINTIFFS' RESPONSE TO
MEMORANDUM OF CLASS
REPRESENTATIVE MARILYN MARTIN

AND

MOTION TO DISQUALIFY COUNSEL

Class Counsel¹ hereby submit the following Response to the Memorandum of Class Representative Marilyn Martin submitted by attorney Alana Bullis. After being retained by Ms. Martin, Class Counsel used their experience in related litigation and class action litigation generally to prosecute this action to near resolution. A firm settlement in principle has been

¹ "Class Counsel" for the purposes of this Response and Motion include Steve Hansen, Debra Hayes, David Futscher and Van Bunch, but not Alana Bullis.

negotiated with defendants, of which Ms. Bullis and Ms. Martin have been fully apprised. Class Counsel have attempted to address their stated concerns on several occasions. Ms. Bullis' interference with the progression of the settlement to the preliminary approval stage, motivated strictly by personal gain, is similar to her unsuccessful attempts to interfere in another case pending in this Division before Judge Ronald B. Leighton, *Su Shin v. Esurance* 08-cv-05626 ("Shin"). Ms. Bullis' Motion to Postpone the final approval hearing in *Shin* was swiftly renounced and promptly denied by Judge Leighton on January 29, 2010. *See* Exhibits 1 and 2 (also allowing addition of new class representative). Ms. Bullis immediately noticed an appeal, seeking to interfere further with the efficient administration of justice with her groundless "objections."²

A similar reaction by this Court to Ms. Bullis' frivolous and misguided antics is appropriate. The Court can and should proceed with the hearing of a preliminary approval motion. Further, the Court should disqualify Ms. Bullis as counsel for the putative Class.

A. Relevant History of these Proceedings.

Ms. Martin retained Ms. Bullis initially to pursue an individual claim for diminution of value. In the Spring of 2008, Ms. Bullis contacted attorney Steve Hansen. *See* Declaration of Steve Hansen (Exhibit 3) at 2 ("Hansen Decl.") (filed under seal). Ms. Bullis told Mr. Hansen she had heard about a recent class action settlement involving claims pertaining to Allstate's failure to compensate its insureds for the loss of value to their vehicles under the Uninsured

² This Court may well recall similar tactics employed by Ms. Bullis in *Bullis v. Nichols*, No. CV-05-0581-RJB, *aff'd with fees and costs* as No. 05-35966 (9th Cir. July 14, 2008) (noting this Court's findings that the claims in the underlying action were "unreasonable, frivolous, meritless and vexatious.") *See* Orders attached as Exhs. 4 and 5. Class Counsel offer to the Court for *in camera* review, as well, correspondence Ms. Bullis sent to the clients in *Shin*, *Martin* and *Hovenkotter* that outline plainly the vexatious intent motivating her frivolous assertions here. By Minute Entry dated February 2, 2010, Judge Leighton vacated entry of the judgment to accommodate certain pending notice issues under 28 U.S.C. § 1715.

Motorist provisions of the insuring agreement. Ms. Bullis told Mr. Hansen she had a number of clients who had property damage claims under the Underinsured Motor provisions of their insuring agreements. Hansen Decl. at 1. Ms. Bullis told Mr. Hansen that she had never before participated as counsel in a class action but “wanted to learn.” Id. at 1.

After months of unsuccessful attempts to resolve the individual claim, in October 2008, Ms. Bullis informed Mr. Hansen that Ms. Martin was interested in pursuing a class case. Hansen Decl. at 2. Ms. Bullis ultimately referred Ms. Martin to Mr. Hansen’s co-counsel, and by retainer agreement dated November 4, 2008, Ms. Martin retained the law firms of Debra Brewer Hayes, P.C. and Reich & Binstock as putative class counsel to pursue this matter as a class action. The retainer signed by Ms. Martin provides that the retained class counsel may elect to affiliate with other attorneys on this matter. See Martin Retainer Agreement, Exhibit B. Accordingly, Mr. Hansen, Van Bunch, David Futscher and each of their respective law firms agreed to represent the putative class. Collectively these firms brought to the table considerable expertise and experience in handling class action matters. See Hansen Decl. at 2; Declaration of David Futscher (Exhibit 6) at ¶¶2-3 (“Futscher Decl.”).³

Work proceeded on Ms. Martin’s case, and on behalf of the plaintiff and the class in *Shin* before Judge Leighton⁴. Hansen Decl. at 2. Ms. Bullis was added to the ECF list so that she would receive copies of all pleadings, but she did not actively participate in this matter or in *Shin* or in *Hovenkotter*. Hansen Decl. at 2. Counsel continued to prosecute all three related actions cooperatively. In fact, in 2009, Ms. Bullis informed Mr. Hansen that she was closing her law practice for medical reasons, and Mr. Hansen even accepted several client referrals from Ms.

³ These Firms’ resumes are attached as Exhibits 7, 8 and 9.

⁴ Ms. Bullis also associated with the same counsel to prosecute another similar action pending in this District, *Hovenkotter v. Safeco Ins. Co.*, No. 2:09-CV-00218-JLR (“*Hovenkotter*”).

Bullis as the result of her stated intent to close her practice. Further, as late as December 26, 2009, Ms. Bullis and Ms. Hayes were communicating concerning matters pertaining to final approval and securing Ms. Shin's presence at the final approval hearing in her case. *Id.* at 3.

Class Counsel and defense counsel had also begun settlement discussions in this case. Shortly after the Court denied defendant's motion to dismiss, the parties began to engage in settlement negotiations on behalf of a proposed settlement class. Declaration of Debra Brewer Hayes at ¶ 4 ("Hayes Decl."), attached as Exhibit 10. Futscher Decl. at ¶4. For approximately six months, Class Counsel negotiated the terms of the settlement along the same lines as prior diminished value class action settlements that were court approved with little or no objection.⁵ *Id.* Principal terms of the settlement were achieved as of December 23, 2009.

It was only in January 2010 that Ms. Bullis began to voice concerns to Mr. Hansen and Ms. Hayes, first about the settlement agreement in *Shin*, which she had already signed months before. Hansen Decl. at 3. Mr. Hansen and Ms. Hayes initially addressed a number of Ms. Bullis' concerns about the settlement proposal over the telephone. *Id.* at 3. Mr. Hansen and Ms. Hayes thereafter received an email thanking them for the discussion, where Ms. Bullis stated her understanding that in class actions "the class does not receive full value" and also reiterated her understanding that she was "not a class counsel." *Id.* at 3. Ms. Bullis concluded her email stating:

I do not know any of the other attorneys involved in all these cases, but I trust Steve, so since Steve has told me, and Debra assured me, that the class is being well taken care of, then I will believe that.

⁵ Those actions were *Busani v. USAA*, Pierce County Superior Court No. 99-208-217-1, *Laughlin v. Allstate*, Pierce County Superior Court No. 02-210380-0 and *Rose v. Nationwide*, Pierce County Superior Court, No. 02-206621-1.

Ms. Bullis soon thereafter, however, began in earnest to undermine the settlement efforts of Class Counsel in both this case and *Shin*. Ms. Bullis began by demanding that Class Counsel communicate with Ms. Martin only through Ms. Bullis. Hansen Decl. at 4.⁶ When reminded that Ms. Martin, as a class representative, had a duty to communicate with Class Counsel, Ms. Bullis capitulated, but insisted that she be present at any meeting. *Id.* at 4.

Mr. Hansen and Mr. Futscher met with Ms. Martin on January 13, 2010 for almost 2 hours. Ms. Bullis was present, as was Ms. Martin's bodily injury attorney and Ms. Martin's daughter. Hansen Decl. at 4; Futscher Decl. at ¶6. Mr. Futscher explained the status of the case, the proposed settlement and sought to address any concerns. Futscher Decl. at ¶¶7-14.

Ms. Bullis then stated that she wanted to voice her concerns and soon became belligerent, pointing at Mr. Futscher and declaring that she had "caught class counsel with their hands in the cookie jar." Hansen Decl. at 4; Futscher Decl. at ¶15. Attempts to reason with her caused her to become more agitated. As the meeting adjourned, the situation remained fluid. Futscher Decl. at ¶17. Mr. Futscher asked Ms. Martin if he could call her. Ms. Martin consented. Hansen Decl. at 4; Futscher Decl. at ¶17.

Mr. Futscher did speak to Ms. Martin by telephone on January 15, 2010, but Ms. Martin then advised that she would only speak to Class Counsel through Ms. Bullis and that Ms. Bullis would be sending a letter to that effect. Futscher Decl. at ¶19. Ms. Bullis sent Mr. Futscher an email on January 15, 2010, stating that she understood that Mr. Futscher wished to talk to Ms. Martin concerning the settlement offer and that Ms. Martin would be available to discuss this in the presence of Ms. Bullis. Hansen Decl. at 4. Despite the outcome of the previous meeting, Mr.

⁶ Ms. Bullis similarly prepared letters for the Class Representatives in the *Shin* and *Hovenkotter* cases with the same purported instruction for Class Counsel to communicate exclusively through Ms. Bullis.

Hansen agreed to meet with Ms. Bullis and Ms. Martin on January 21, 2010. *Id.* at 4. Ms. Bullis arrived at this scheduled meeting alone, but after Mr. Hansen insisted on speaking with Ms. Martin, Ms. Bullis said she would make Ms. Martin available by telephone. *Id.* at 5. Ms. Martin indicated that she completely deferred to Ms. Bullis and said nothing further. *Id.* at 5; Futscher Decl. at ¶22.

At Ms. Bullis' request, the next day, January 22, 2010, another conference call was held with Ms. Bullis, Class Counsel and a consulting expert concerning the value of the proposed settlement, Mr. Darrell M. ("Mike") Harber. Hansen Decl. at 5. Believing that Mr. Harber had addressed the very concerns that Ms. Bullis had described the previous day as her reason for wanting to speak to Mr. Harber, Class Counsel asked Ms. Bullis to identify any further concerns. *Id.* at 5. She refused, stating that she would discuss these concerns "in front of Judge Bryan." *Id.* at 5.

The impasse in the relationship between Ms. Bullis and Class Counsel is further amply demonstrated by the "Opposition to Class Counsel's Motion to Add/Or Substitute Class Representative" filed by Ms. Bullis in *Shin* on January 28, 2010 (see Exhibit 10), in which Ms. Bullis baselessly accuses Class Counsel of ethics violations and alludes to the "greed and self-interest" of Class Counsel – who in reality were doing nothing more than simply seeking final approval of a fair settlement with Esurance already preliminarily approved by Judge Leighton, and previously agreed to by Ms. Bullis herself.

B. Ms. Bullis' Conduct Shows Serious Disregard For the Orderly Process of Justice and Reveals She Is Motivated Solely By Pecuniary Self-Interest.

Ms. Bullis' sudden reversal of course, from cooperating co-counsel to staunch opponent in early January of this year surprised Class Counsel. At the time, Class Counsel took at face

value Ms. Bullis' assertions that she was acting in good faith to protect the interests of absent class members. So, Class Counsel undertook to address her concerns and answer her questions. Unfortunately, the efforts of Class Counsel were met with stubborn refusal to yield on any positions, combined with ever-increasing vitriole and transparent manipulation of the Class Representatives to try to place herself in the role of sole-determiner of how this case would proceed. Upon further investigation of her conduct, it is now apparent to Class Counsel that Ms. Bullis' positions are neither well-grounded in fact or law nor interposed for a proper purpose. Simply stated, Ms. Bullis is trying to take over the cases for her own financial gain contrary to the best interests of the Class and the orderly administration of justice.

Before Ms. Bullis began expressing her concerns in *Shin* and this case, she shopped the cases to potential other co-counsel. Once those efforts failed, apparently to buy time, Ms. Bullis began raising her baseless objections and alleging misconduct on the part of Class Counsel, then ultimately tried to seize control of the cases for herself by telling the clients to shut down communication with Class Counsel and abdicate their supervisory responsibility to Ms. Bullis.

Ms. Bullis first raised her concerns to Class Counsel in early January, 2010. Before then, she contacted an attorney with whom she used to work to see if he would associate with her in "her class action litigation in Washington." See Declaration of David Wattel dated January 29, 2010, attached as Exhibit 11 at ¶ 2 ("Wattel Dec."). Ms. Bullis expressed her concern – and revealed her true motivations – when she told Mr. Wattel that she feared being "cheated" by Class Counsel out of "her fair share of the proceeds." Id. Citing personal and business concerns, outlined further in his Declaration, Mr. Wattel declined to follow up on the offer.

Similarly, and even more tellingly, Ms. Bullis contacted Mr. Harber looking for assistance in her plot to take over control of the pending diminished value class actions, including this case. Mr. Harber's deposition testimony taken February 2, 2010 will show that Ms. Bullis also privately contacted Mr. Harber in an attempt to persuade him to assist her efforts to obtain new counsel in this case and *Shin*. In so doing, she made at least one knowingly false statement of fact to Mr. Harber. She told him that Ms. Hayes advocated to the Court at the *Shin* final approval hearing for the imposition in these cases of a mode of damage calculation in diminished value cases that would effectively put Mr. Harber "out of a job." That is simply not true.

It is thus plain that Ms. Bullis' conduct is designed to interfere with the fair administration of justice solely to promote her personal pecuniary interest. In effect, she is grinding the wheels of justice to a halt in a transparent attempt to supplant Class Counsel by raising meritless objections, interfering with Class Counsel's relationship with the Class Representative and delaying the proceedings using the Federal Rules of Civil Procedure as a weapon, not a tool. The Court need not tolerate this behavior. *See In re Prudential Insurance Company America Sales Practice Litigation Agent Actions*, 278 F.3d 175 (3d Cir. 2002) (counsel for objectors sanctioned for vexatious conduct for filing frivolous recusal motion, unwarranted criticism of fee examiner, releasing recusal motion to press, filing affidavits solely to embarrass judge, discovery failures and abusively filing motions for sanctions); *Kapco Mfg. Co. v. C&O Enters, Inc.*, 886 F.2d 1485, 1491 (7th Cir. 1989) (over \$46,000 in sanctions appropriate where attorney pursued "a path that a reasonably careful attorney would have known, after appropriate inquiry, to be unsound").

C. A Firm Settlement Proposal Has Been Negotiated.

On January 25, 2010, counsel for the parties submitted a Joint Status Report [Dkt.65] detailing counsel's efforts in ongoing settlement negotiations. Debra Hayes has served as the lead negotiator on behalf of the putative class. Marci Eisenstein has served as the lead negotiator on behalf of the defendants. As of December 2, 2009, the parties reached an agreement in principle as to the general structure of the settlement. By December 23, 2009, counsel for the parties had reached an agreement in principle regarding financial terms of the settlement.

As of year-end 2009, negotiating counsel for the parties were thus prepared to proceed to negotiate attorneys' fees, to document the settlement agreement, and to present a motion for preliminary approval to the Court. However, this process was stalled when counsel for defendants learned that negotiating counsel for the putative class appeared to be at an impasse with the named plaintiff, Ms. Martin and that Ms. Martin is acting at the direction of Ms. Bullis and refusing to speak directly with counsel for the putative class.

On January 27, 2010, this Court issued an Order [Dkt. 67] indicating the Court's impression that the case was not as near to settlement as counsel earlier reported. A firm settlement proposal is in fact in place. The negotiation of attorneys' fees and the documenting of the agreement are the only steps remaining to be taken, but these steps are blocked due to the uncertainty cast into the situation by Ms. Bullis' efforts to undermine the settlement process.

D. The Court Should Set an Appropriate Schedule and Allow This Matter to Proceed to a Motion for Preliminary Approval of the Negotiated Settlement.

The Court should Order the parties to proceed to negotiate attorneys' fees, document the agreement reached in principle by negotiating counsel for the parties and move for preliminary approval of the settlement. Ms. Bullis' filings are not consistent with the facts.

Ms. Martin retained Class Counsel to pursue her class claims – she did not retain Ms. Bullis for this purpose. Ms. Bullis herself initially sought out the assistance of Class Counsel. Ms. Bullis' agreement to this arrangement was based on her utter lack of class action experience and the fact that she had heard about Class Counsel's achievement of a settlement in the Allstate matter –one that compares favorably to the settlement proposed here.

While this action was being prosecuted, Ms. Bullis even informed Mr. Hansen that she was closing her law practice. Nonetheless, after six months of negotiations between Class Counsel and defense counsel leading to a proposal for a settlement class, Class Counsel kept Ms. Bullis informed and addressed her concerns about the settlement proposal, first over the telephone and later over the course of several meetings. In the unanimous judgment of Class Counsel, Ms. Bullis' concerns were not well reasoned and reflected her inexperience and lack of solid judgment about what a fair and reasonable settlement would be in this matter. Nonetheless, Class Counsel made every effort to allow her to voice her concerns and even to address questions to Mr. Harber, the diminished value consultant.

Class Counsel kept Ms. Bullis apprised and informed and addressed her concerns even as by her own admission she was "not a class counsel" and that due to her inexperience she would have to defer to the judgment of Class Counsel of whether the class was "being taken care of." Class Counsel also respected the request of the class representative, Ms. Martin, as soon as she made clear that her preference was to communicate with Class Counsel only through Ms. Bullis.

Class Counsel has prosecuted this matter successfully after defeating defendant's motion to dismiss and thereafter, drawing on their experience and negotiating an excellent settlement on behalf of a proposed settlement class. Lead counsel for the putative class "may be designated by

consensus of interested counsel.” 3 *Newberg on Class Actions* §9:35. Here, all interested counsel agreed that Ms. Hayes and Mr. Bunch would take leadership responsibilities in prosecuting this matter on behalf of the class. As part of that leadership, Ms. Hayes and Mr. Bunch determined that Ms. Hayes would best serve as the lead negotiator on behalf of the putative class in the settlement negotiations with defendant.

Acting as lead counsel, Ms. Hayes and Mr. Bunch agreed to typical leadership duties of the prosecution of the case on behalf of the putative class, including primary responsibility for drafting pleadings, conducting discovery, arguing motions before the Court, and conducting the settlement negotiations.⁷ Class Counsel acted appropriately and in the best interests of the putative class by engaging Defendants in settlement negotiations, and seeking a fair resolution on behalf of the class. *In re Issuer Plaintiff Initial Public Offering Antitrust Litig.*, 234 F.R.D. 67, 69 (S.D.N.Y. 2006) (“the law firm acting on behalf of both the individual plaintiffs and the putative class must still seek a settlement that is fair, reasonable and adequate for the class even if not officially appointed as interim class counsel”); Comment to Fed.R.Civ.P. 23(g) (“Settlement may be discussed before certification.”). Class Counsel further kept Ms. Martin and Ms. Bullis informed about negotiations and have answered every concern Ms. Bullis voiced. Hansen Decl. at 6.

Mr. Hansen has ten years experience specifically in the type of action at issue here, a diminished value class action case, and his experience in the diminished value area has included multiple appearances in the Washington Court of Appeals and consideration by the Washington

⁷ With no other related class action cases against Hartford on the Court’s docket, and with the agreement of all interested counsel, there was no rivalry among counsel that necessitated an appointment by the Court of interim counsel for the class under Rule 23(g) of the Federal Rules of Civil Procedure. *See* Comment to Fed.R.Civ.P. 23(g) (“In some cases . . . there may be rivalry or uncertainty that makes formal designation of interim counsel appropriate.”).

Supreme Court. Hansen Decl. at 6. Class Counsel previously spent approximately a million dollars to develop a model to determine damages on a class-wide basis in diminished value litigation. *Id.* at 6. Although this case is now poised for settlement after a relatively short history, the substantial previous work of Mr. Hansen and his co-counsel in other cases has been a factor in helping this case come to resolution. *Id.* at 6.

Class Counsel's efforts were undertaken consistent with the representation agreement with Ms. Martin and resulted in an excellent settlement for a proposed class. Ms. Bullis' complaint that she and Ms. Martin were excluded from settlement discussions is similar to the complaints lodged in *Banyai v. Mazur*, 2004 WL 1948755 (S.D.N.Y. Sept. 1, 2004), where the representative plaintiffs moved to discharge class counsel for pursuing a partial settlement which in the opinion of the class representatives "undermine[d] the interests of class members." *Id.* at *1. The *Banyai* court denied the motion to replace class counsel, finding that class counsel, in pursuing settlement, committed no misconduct and "are obligated to make independent judgments as to the interests of the class members and cannot allow decisions on behalf of the class to rest exclusively with the named plaintiffs." *Id.* The *Banyai* court noted that to the extent the class representatives were concerned with the adequacy or fairness of the proposed partial settlement, they were "welcome to voice those concerns directly or through their counsel at any hearing pertaining to the merits of that proposed partial settlement held pursuant to Fed.R.Civ.P. 23." *Id.*

Allowing the concerns of Ms. Bullis and Ms. Martin to be heard at the time of hearing on the merits of the settlement, as in *Banyai*, is also appropriate here. *See also Kincade v. General Tire & Rubber Co.*, 635 F.2d 501, 508 (5th Cir. 1981) (client in a class action consists of

numerous unnamed class members as well as the class representatives, which can force class counsel to act in what he or she perceives to be in the best interests of the class as a whole); *Maywalt v. Parker & Parsley Petroleum Co.*, 155 F.R.D. 494 (S.D.N.Y. 1994), *aff'd*, 67 F.3d 1072 (2d Cir. 1995) (denying representative plaintiffs' application to replace class counsel with their own counsel on the ground that class counsel "merely submitted the proposed settlement as a 'fait accompli,'" and noting that concerns of named plaintiffs would most appropriately be heard at time of the settlement hearing); *Walsh v. Great Atl. & Pac. Tea Co.*, 726 F.2d 956, 964 (3d Cir. 1983) (affirming denial of named plaintiff's motion to relieve class counsel where trial court had considered whether class counsel was providing fair and adequate representation to the class as a whole).

Ms. Bullis' opposition to a settlement in this case is best heard at the time of a hearing on the merits of the settlement's approval. Given the circumstances, assuming Ms. Bullis' and Ms. Martin's continued lack of cooperation, the Court would have authority to grant Class Counsel time to find a suitable and adequate additional class representative and if necessary, finally approve the Settlement over Ms. Martin's objection.⁸ A settlement can be found to be fair even in the face of objection by a named representative. *Thomas v. Albright*, 139 F.3d 227, 232 (D.C. Cir. 1998); *Flynn v. FMC Corp.*, 528 F.2d 1169, 1174 n. 19 (4th Cir. 1975) (all three class plaintiffs dissented but settlement approval still affirmed); *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1216 (5th Cir. 1978) ("To be sure, the assent of named plaintiffs is not a prerequisite to the approval of a settlement"); *Walsh v. Great Atl. & Pac. Tea Co.*, 726 F.2d 956, 964 (3d Cir. 1983) ("Class counsel's duty to the class as a whole frequently diverges from the

⁸ By Order dated January 29, 2010, Judge Leighton granted Class Counsel's motion to add a new representative plaintiff in the *Shin* matter.

opinion of either the named plaintiff or other objectors”).

Even if Ms. Bullis’ concerns regarding the settlement are heard now, the Court should conclude that the objections are not well reasoned and not in the best interests of the approximately 23,000 class members. If judged by the current filings, any objection would be highly unlikely to detract from the settlement.

First, Ms. Bullis raises a concern regarding the scope of the release, which is clearly premature as no release language has been proposed. Next, Ms. Bullis questions how the parties determined the proposed settlement per claim average amount. As noted above, settlements involving per claim average payments in the same range as proposed here have been approved in four other cases – *Busani*, *Laughlin*, *Rose* and *Shin*. Counsel are informed that the range of payments here is in line with payments actually made in resolving claims in Georgia, where diminished value claims must be adjusted by all insurers.

Moreover, there is no added benefit or consideration for additional claims, all of which permit the same recovery. Ms. Bullis questions which state’s law would control for the settlement class, but this issue completely misses the mark – all claims for diminished value would be resolved, no matter in what state they arose and the scope of release determined accordingly. Moreover, a breach of contract claim *has* been asserted for every state, as breach of contract claims are fairly uniform throughout the United States.

Ms. Bullis would also further argue that the settlement would somehow not be fair or reasonable because class counsel never raised a bad faith claim under WAC 284-30-330. However, these claims are problematic to assert effectively in a national class action. There are considerable obstacles to the certification of a nationwide class alleging false or deceptive

practices in claims handling under the Washington consumer protection statute. State consumer protection laws “vary considerably, and courts must respect these differences rather than apply one state’s laws to sales in other states with different rules.” *In re Bridgestone/Firestone Inc.*, 288 F.3d 1012, 1020 (7th Cir. 2002). Consumer fraud laws of the states “differ with regard to the defendant’s state of mind, type of prohibited conduct, proof of injury-in-fact, available remedies, and reliance, just to name a few.” *In re Prempro*, 230 F.R.D. 555, 564 (E.D. Ark. 2005). A court obliged to apply the laws of all fifty states may well find individual questions to overwhelm any common questions. *In re Rezulin Products Liability Litig.*, 210 F.R.D. 61, 68 (S.D.N.Y. 2002). In the end, a “nationwide class alleging violations of the laws of multiple jurisdictions would likely require at least one representative plaintiff from each jurisdiction” to meet the adequacy requirements of Fed. R. Civ. P. 23(a), when it comes time for the motion for class certification. *Whitson v. Bumbo*, 2009 WL 1515597 (N.D. Cal. Apr. 16, 2009) (dismissing causes of action framed as nationwide class allegations of violation of each state’s respective consumer protection laws).

Very recently, the Washington Supreme Court in *Schnall v. AT&T*, Case No. 80572-5, appeal from King County Superior Court Case No. 02-2-05776-4 (Hon. Douglas A. North), held that the Washington Consumer Protection Act could not be extended to claims arising in other states. *See* Slip op. at 15 (“nothing in our law indicates that CPA claims by nonresidents for acts occurring outside of Washington can be entertained under the statute”).⁹ The *Schnall* Court concluded that a nationwide class action should not be certified under the Washington CPA. *See* Slip op. at 22 (Washington need not apply its Consumer Protection Act “to citizens of other

⁹ available at:

<http://www.courts.wa.gov/opinions/index.cfm?fa=opinions.showOpinion&filename=805725MAJ>. Copy attached as Exhibit 12.

states in order to protect the interests of citizens of Washington. A nationwide class would be unmanageable and unduly burdensome on the trial court and the state judicial system and serve no real benefit to plaintiffs who are free to bring statewide class actions in their home states.”). Clearly, after *Schnall*, there is no appreciable “added value” for asserting such claims.

E. The Court Should Disqualify Ms. Bullis.

The right to disqualify counsel is “within the discretion of the trial court as an exercise of its inherent powers.” *United States v. Wunsch*, 84 F.3d 1110, 1114 (9th Cir. 1996); *Silva v. Gregoire*, 2007 WL 1046888, *1 (W.D. Wash. Apr. 3, 2007); *see also Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991) (court has inherent power to disqualify counsel at its discretion, which is not supplanted by the Federal Rules of Civil Procedure). Disqualification is a drastic measure that should be subjected to “particularly strict judicial scrutiny.” *Optyl Eyewear Fashion Int’l Corp. v. Style Cos.* 760 F.2d 1045, 1050 (9th Cir. 1985); *Silva*, 2007 WL 1046888 at *1.

The Court must determine a motion to disqualify counsel by measuring the facts of the particular case. *Beck v. Board of Regents of State of Kan.*, 568 F. Supp. 1107, 1110 (D. Kan. 1983). A decision to disqualify counsel “must be based on a factual inquiry conducted in a manner allowing appellate review, but an evidentiary hearing is not necessarily required.” *The MJK Family LLC v. Corporate Eagle Management*, --- F. Supp. 2d ---, 2009 WL 4928821, *6 (E.D. Mich. Dec. 21, 2009), citing *General Mill Supply Co. v. SCA Servs.*, 697 F.2d 704, 710 (6th Cir. 1982).

It is well-established that a court may disqualify counsel for prejudicial professional misconduct. *Cresswell v. Sullivan & Cromwell*, 922 F.2d 60, 72 (2d Cir. 1990) (“The

disqualification of an attorney in order to forestall violation of ethical principles is a matter committed to the sound discretion of the trial court”); *Ceramco, Inc. v. Lee Pharmaceuticals*, 510 F.2d 268, 270-71 (2d Cir. 1975). The Court should disqualify counsel if the offending attorney’s conduct threatens to “taint” the underlying trial. *Data Capture Solutions Repair & Remarketing, Inc. v. Symbol Technologies, Inc.*, 2008 WL 4681676 (D. Conn. Oct. 17, 2008) (disqualification should only be granted where violation of Rules of Professional Conduct poses “risk of trial taint”); *Biocore Medical Technologies, Inc. v. Khosrowshahi*, 181 F.R.D. 660, 664 (D. Kan. 1998) (same). The court must recognize “the need to check certain egregious forms of misconduct” – while leaving less serious allegations of ethical impropriety to the federal and state disciplinary machinery. *Board of Ed. Of City of New York v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979).

Ms. Bullis’ bad faith and egregious conduct here is evident from the factual record. Her continued participation as co-counsel for the class threatens to unduly taint, stall and interfere with these proceedings. Ms. Bullis did far more here than violate her duty to cooperate with co-counsel and to refrain from interfering with the attorney-client relationship between Ms. Martin and retained Class Counsel.

To begin, Ms. Bullis did not show candor to the tribunal when falsely stating that Ms. Martin was not informed of the settlement until January 21, 2010. *See* Rule 3.3, Washington Rules of Professional Conduct (“RPC”); Futscher and Hansen Declarations.

Ms. Bullis has made up a list of objections to the progression of this case to the preliminary approval stage, supposedly in the interests of Ms. Martin and the class, when her true motivation is her pecuniary self-interest. *See* Rule 3.1, Washington RPC (requiring basis in fact

for asserting an issue in a proceeding); Wattel Dec. at 2.¹⁰ Ms. Bullis' filings in this case were thus undeniably made with the indefensible purpose of disrupting the progression of this case to the preliminary approval stage, ostensibly in the interests of the class, but truly for the purpose of working a separate deal with the defendant, in order to line her own pockets. This is not just a matter of not making meritorious claims. It is a shockingly transparent and blatant violation of Rule 3.5, Washington RPC ("lawyer shall not engage in conduct intended to disrupt a tribunal"), and Rule 8.4(c) and (d), Washington RPC (professional misconduct to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation" or to "engage in conduct that is prejudicial to the administration of justice").

Ms. Bullis also privately contacted Mr. Harber in an attempt to persuade him to abandon his cooperation with Class Counsel and to assist her efforts to interfere with this and the *Shin* matters. In so doing, she made knowing false statements of fact to Mr. Harber. Mr. Harber's deposition confirms that Ms. Bullis falsely told him that Ms. Hayes planned to advocate to the Court at the *Shin* final approval hearing for the imposition of a mode of damage calculation in diminished value cases generally, which would effectively put Mr. Harber "out of a job." See Rule 4.1, Washington RPC ("In the course of a representation, a lawyer shall not make a false statement of material fact or law to a third person").

As stated earlier, the Court's role is to make a decision regarding disqualification of counsel based on all the relevant facts. *Taylor v. County of Berks*, 2003 WL 21119689 (E.D. Pa. May 16, 2003) (disqualifying plaintiff's counsel based on "the totality of the facts"). Given the totality of circumstances here, the Court must recognize that Ms. Bullis' conduct is truly the type

¹⁰ Ms. Bullis' intent to collect additional fees is blatantly apparent when she herself describes her substantively identical filings in *Shin* in correspondence to Ms. Martin and to another client, Mr. Martin Hovenkotter. These letters are available for the Court to review *in camera*.

of egregious misconduct that warrants the unusual measure of disqualification. The Court should so order.

F. Conclusion

The Court should allow time for the negotiation of attorneys' fees, the documentation of the settlement agreement and the presentation of a motion for preliminary approval of the proposed settlement in this matter. The Court should also enter its order disqualifying Ms. Bullis from further representation in this matter.

RESPECTFULLY SUBMITTED this 3rd day of February, 2010.

LOWENBERG, LOPEZ & HANSEN, PS

/s/ Stephen M. Hansen

STEPHEN M. HANSEN, WSBA # 15642
Of Attorneys for Plaintiff

Debra Brewer Hayes
REICH & BINSTOCK
4265 San Felipe, Suite 1000
Houston, TX 77027
Telephone: (713) 622-7271
Fax: (713) 623-8724
dhayes@dhayeslaw.com

Elaine A. Ryan
Patricia N. Syverson
BONNETT, FAIRBOURN, FRIEDMAN
& BALINT, P.C.
2901 N. Central Ave., Suite 1000
Phoenix, AZ 85012
Telephone: (602) 274-1100
Fax: (602) 798-5825

Van Bunch
BONNETT, FAIRBOURN, FRIEDMAN
& BALINT, P.C.
57 Carriage Hill
Signal Mountain, Tennessee 37377
Telephone: (423) 886-9736
David A. Futscher
PARRY DEERING FUTSCHER
& SPARKS, PSC
411 Garrard Street, P.O. Box 2618
Covington, KY 41012-2618
Telephone: (859) 291-9000
Fax: (859) 291-9300
dfutscher@pdfslaw.com

CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2010, I caused the foregoing Class Plaintiffs' Response to Memorandum of Class Representative Marilyn Martin and Motion to Disqualify to be electronically filed with the Clerk of the Court using the CM/ECF system which will send notification to all counsel to be noticed.

/s/Debra Brewer Hayes

DEBRA BREWER HAYES

THE HONORABLE RONALD B. LEIGHTON

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

SU SHIN, on behalf of herself and all others
similarly situated,

Plaintiff,

vs.

ESURANCE INSURANCE COMPANY, a
Wisconsin corporation, ESURANCE
PROPERTY AND CASUALTY
INSURANCE COMPANY, a California
corporation, ESURANCE INC., a Delaware
corporation, and ESURANCE INSURANCE
SERVICES, INC., a Delaware corporation,

Defendants.

Case No. 08-CV-05626-RBL

CLASS PLAINTIFFS' OPPOSITION TO
"MEMORANDUM OF AUTHORITIES TO
POSTPONE CLASS PLAINTIFF'S
MOTION FOR FINAL APPROVAL OF
CLASS ACTION SETTLEMENT AND
SETTLEMENT CLASS CERTIFICATION"

TO THE HONORABLE RONALD B. LEIGHTON:

Counsel for the preliminarily-approved Settling Class respectfully submit their
opposition to the "Memorandum of Authorities to Postpone Class Plaintiff's Motion for Final

OPPOSITION TO MOTION TO POSTPONE
FINAL APPROVAL OF SETTLEMENT

LOWENBERG, LOPEZ & HANSEN, P.S.
ATTORNEYS AT LAW
SUITE 450, RUST BUILDING
950 PACIFIC AVENUE
TACOMA, WASHINGTON 98402-4441
(253) 383-1964/ (253) 838-4993
(253) 383-1808 FAX

1 Approval of Class Action Settlement and Settlement Class Certification" filed on January 14,
 2 2010, by attorney Alana Bullis, purportedly on behalf of Class Representative Su Shin, and
 3 request that the Court find no merit to the tardy assertions made by Ms. Bullis and enter its
 4 Order of Final Approval of the Settlement.

5 *A. The objection to the Settlement is late and should be disregarded for that reason.*
 6 *Additionally, the objection should be disregarded because both Ms. Shin and Ms. Bullis*
 7 *assented to the Settlement before entry of the Order of preliminary approval.*

8 On October 2, 2009, this Court, following a full hearing, entered its Order preliminarily
 9 approving the proposed settlement of this action under which some 2800 Esurance insureds
 10 could file claims to receive payments averaging \$283 for payment of diminished value ("DV")
 11 resulting from damage to their vehicles in an accident with an uninsured or underinsured
 12 motorist. Before that hearing and the entry of the Order of preliminary approval, both Class
 13 Representative Su Shin and her referring counsel, Ms. Bullis, indicated their assent to and
 14 approval of the proposed settlement. See email correspondence from Ms. Bullis dated July 16,
 15 2009, indicating Ms. Shin's approval, and executed signature page of Ms. Bullis dated August
 16 3, 2009, attached as Exhibits 1 and 2, respectively.

17 Pursuant to the Court's Order preliminarily approving the proposed Settlement, anyone
 18 with any objection to the Settlement or who wished not to participate in the Settlement could
 19 file an objection or opt out of the Class by filing appropriate documentation on or before
 20 December 29, 2009. No one did so.

21 Thereafter, beginning with an email from Ms. Bullis on January 4, 2010, attached as
 22 Exhibit 3, Ms. Bullis began expressing her unfounded concerns about the proposed Settlement.

23
 24
 25
 26
 27
 28
 29
 30
 31
 32
 33
 34
 35
 36
 37
 38
 39
 40
 41
 42
 43
 44
 45
 46
 47
 48
 49
 50
 51
 52
 53
 54
 55
 56
 57
 58
 59
 60
 61
 62
 63
 64
 65
 66
 67
 68
 69
 70
 71
 72
 73
 74
 75
 76
 77
 78
 79
 80
 81
 82
 83
 84
 85
 86
 87
 88
 89
 90
 91
 92
 93
 94
 95
 96
 97
 98
 99
 100
 101
 102
 103
 104
 105
 106
 107
 108
 109
 110
 111
 112
 113
 114
 115
 116
 117
 118
 119
 120
 121
 122
 123
 124
 125
 126
 127
 128
 129
 130
 131
 132
 133
 134
 135
 136
 137
 138
 139
 140
 141
 142
 143
 144
 145
 146
 147
 148
 149
 150
 151
 152
 153
 154
 155
 156
 157
 158
 159
 160
 161
 162
 163
 164
 165
 166
 167
 168
 169
 170
 171
 172
 173
 174
 175
 176
 177
 178
 179
 180
 181
 182
 183
 184
 185
 186
 187
 188
 189
 190
 191
 192
 193
 194
 195
 196
 197
 198
 199
 200
 201
 202
 203
 204
 205
 206
 207
 208
 209
 210
 211
 212
 213
 214
 215
 216
 217
 218
 219
 220
 221
 222
 223
 224
 225
 226
 227
 228
 229
 230
 231
 232
 233
 234
 235
 236
 237
 238
 239
 240
 241
 242
 243
 244
 245
 246
 247
 248
 249
 250
 251
 252
 253
 254
 255
 256
 257
 258
 259
 260
 261
 262
 263
 264
 265
 266
 267
 268
 269
 270
 271
 272
 273
 274
 275
 276
 277
 278
 279
 280
 281
 282
 283
 284
 285
 286
 287
 288
 289
 290
 291
 292
 293
 294
 295
 296
 297
 298
 299
 300
 301
 302
 303
 304
 305
 306
 307
 308
 309
 310
 311
 312
 313
 314
 315
 316
 317
 318
 319
 320
 321
 322
 323
 324
 325
 326
 327
 328
 329
 330
 331
 332
 333
 334
 335
 336
 337
 338
 339
 340
 341
 342
 343
 344
 345
 346
 347
 348
 349
 350
 351
 352
 353
 354
 355
 356
 357
 358
 359
 360
 361
 362
 363
 364
 365
 366
 367
 368
 369
 370
 371
 372
 373
 374
 375
 376
 377
 378
 379
 380
 381
 382
 383
 384
 385
 386
 387
 388
 389
 390
 391
 392
 393
 394
 395
 396
 397
 398
 399
 400
 401
 402
 403
 404
 405
 406
 407
 408
 409
 410
 411
 412
 413
 414
 415
 416
 417
 418
 419
 420
 421
 422
 423
 424
 425
 426
 427
 428
 429
 430
 431
 432
 433
 434
 435
 436
 437
 438
 439
 440
 441
 442
 443
 444
 445
 446
 447
 448
 449
 450
 451
 452
 453
 454
 455
 456
 457
 458
 459
 460
 461
 462
 463
 464
 465
 466
 467
 468
 469
 470
 471
 472
 473
 474
 475
 476
 477
 478
 479
 480
 481
 482
 483
 484
 485
 486
 487
 488
 489
 490
 491
 492
 493
 494
 495
 496
 497
 498
 499
 500
 501
 502
 503
 504
 505
 506
 507
 508
 509
 510
 511
 512
 513
 514
 515
 516
 517
 518
 519
 520
 521
 522
 523
 524
 525
 526
 527
 528
 529
 530
 531
 532
 533
 534
 535
 536
 537
 538
 539
 540
 541
 542
 543
 544
 545
 546
 547
 548
 549
 550
 551
 552
 553
 554
 555
 556
 557
 558
 559
 560
 561
 562
 563
 564
 565
 566
 567
 568
 569
 570
 571
 572
 573
 574
 575
 576
 577
 578
 579
 580
 581
 582
 583
 584
 585
 586
 587
 588
 589
 590
 591
 592
 593
 594
 595
 596
 597
 598
 599
 600
 601
 602
 603
 604
 605
 606
 607
 608
 609
 610
 611
 612
 613
 614
 615
 616
 617
 618
 619
 620
 621
 622
 623
 624
 625
 626
 627
 628
 629
 630
 631
 632
 633
 634
 635
 636
 637
 638
 639
 640
 641
 642
 643
 644
 645
 646
 647
 648
 649
 650
 651
 652
 653
 654
 655
 656
 657
 658
 659
 660
 661
 662
 663
 664
 665
 666
 667
 668
 669
 670
 671
 672
 673
 674
 675
 676
 677
 678
 679
 680
 681
 682
 683
 684
 685
 686
 687
 688
 689
 690
 691
 692
 693
 694
 695
 696
 697
 698
 699
 700
 701
 702
 703
 704
 705
 706
 707
 708
 709
 710
 711
 712
 713
 714
 715
 716
 717
 718
 719
 720
 721
 722
 723
 724
 725
 726
 727
 728
 729
 730
 731
 732
 733
 734
 735
 736
 737
 738
 739
 740
 741
 742
 743
 744
 745
 746
 747
 748
 749
 750
 751
 752
 753
 754
 755
 756
 757
 758
 759
 760
 761
 762
 763
 764
 765
 766
 767
 768
 769
 770
 771
 772
 773
 774
 775
 776
 777
 778
 779
 780
 781
 782
 783
 784
 785
 786
 787
 788
 789
 790
 791
 792
 793
 794
 795
 796
 797
 798
 799
 800
 801
 802
 803
 804
 805
 806
 807
 808
 809
 810
 811
 812
 813
 814
 815
 816
 817
 818
 819
 820
 821
 822
 823
 824
 825
 826
 827
 828
 829
 830
 831
 832
 833
 834
 835
 836
 837
 838
 839
 840
 841
 842
 843
 844
 845
 846
 847
 848
 849
 850
 851
 852
 853
 854
 855
 856
 857
 858
 859
 860
 861
 862
 863
 864
 865
 866
 867
 868
 869
 870
 871
 872
 873
 874
 875
 876
 877
 878
 879
 880
 881
 882
 883
 884
 885
 886
 887
 888
 889
 890
 891
 892
 893
 894
 895
 896
 897
 898
 899
 900
 901
 902
 903
 904
 905
 906
 907
 908
 909
 910
 911
 912
 913
 914
 915
 916
 917
 918
 919
 920
 921
 922
 923
 924
 925
 926
 927
 928
 929
 930
 931
 932
 933
 934
 935
 936
 937
 938
 939
 940
 941
 942
 943
 944
 945
 946
 947
 948
 949
 950
 951
 952
 953
 954
 955
 956
 957
 958
 959
 960
 961
 962
 963
 964
 965
 966
 967
 968
 969
 970
 971
 972
 973
 974
 975
 976
 977
 978
 979
 980
 981
 982
 983
 984
 985
 986
 987
 988
 989
 990
 991
 992
 993
 994
 995
 996
 997
 998
 999
 1000

LOWENBERG, LOPEZ & HANSEN, P.S.
 ATTORNEYS AT LAW
 SUITE 450, RUST BUILDING
 950 PACIFIC AVENUE
 TACOMA, WASHINGTON 98402-4441
 (253) 383-1964/ (253) 838-4993
 (253) 383-1808 FAX

1 Class Counsel spoke with Ms. Bullis and met personally with her for almost three hours on
 2 January 13, 2010, in an unsuccessful attempt to address and resolve her concerns.

3 The next day, Ms. Bullis filed her "Memorandum of Authorities to Postpone Class
 4 Plaintiff's Motion for Final Approval of Class Action Settlement and Settlement Class
 5 Certification" in which she set forth basically three concerns with the proposed Settlement: (1)
 6 that the scope of the release was too broad; (2) that a provision in the Settlement Agreement
 7 and incorporated in the Settlement may violate Rule of Professional Conduct 5.6(b); and (3)
 8 that the settlement amount was inadequate because it failed to "value" unasserted claims under
 9 Washington's Consumer Protection Act.
 10

11 At oral argument on January 15, 2010, Ms. Bullis raised an additional issue on
 12 adequacy of the settlement, asserting that the Settlement failed to account for or advise the
 13 Class of certain asserted personal income tax consequences of payments made on claims paid
 14 under the settlement.
 15

16 While the Court entertained Ms. Bullis' tardy filings and permitted her to air her
 17 grievances in open court, the fact remains that Ms. Bullis' attempts to delay the Settlement are
 18 untimely and inexcusable. They should be denied on that basis alone. *See, e.g., Varacallo v.*
 19 *Massachusetts Mut. Life Ins. Co.*, 226 F.R.D. 207 (D. N.J. 2005); *Ass'n for Disabled*
 20 *Americans, Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 476 (S.D. Fla. 2002); *Haynes v. Shoney's,*
 21 *Inc.*, 1993 WL 19915 at *2 (N.D. Fla. Jan. 25, 1993) (unpub.) (objections filed two days after
 22 deadline "would be reason enough to reject objection"). Importantly, both Ms. Bullis and Ms.
 23 Shin previously assented to the Settlement. Court-approved Notice to the class was given in
 24
 25
 26
 27
 28

OPPOSITION TO MOTION TO POSTPONE
 FINAL APPROVAL OF SETTLEMENT

LOWENBERG, LOPEZ & HANSEN, P.S.
 ATTORNEYS AT LAW
 SUITE 450, RUST BUILDING
 950 PACIFIC AVENUE
 TACOMA, WASHINGTON 98402-4441
 (253) 383-1964/ (253) 838-4993
 (253) 383-1808 FAX

1 reliance on that assent. Neither Ms. Bullis nor Ms. Shin have raised any grounds sufficient to
 2 excuse the late-filed objection or justifying withdrawal of their assent to the Settlement.

3 The Court ordered Class Counsel to respond to Ms. Bullis' Motion. For the reasons that
 4 follow and as argued on January 15, 2010, any purported objections to the Settlement should be
 5 emphatically over-ruled and the Settlement should receive final Court approval.

6
 7 *B. The scope of release is garden variety and of the sort routinely provided in settling any
 claim, class or otherwise.*

8
 9 As the Court noted during oral argument on January 15, 2010, settlements routinely
 10 resolve all claims arising out of the transaction or occurrence giving rise to the claims stated in
 11 the complaint, whether known or unknown. Indeed, the release language at issue in this case is
 12 transactionally-limited in precisely that manner:

13
 14 "Released Claims" means and includes any and all unknown claims, known
 15 claims, rights, demands, actions, causes of action, suits, debts, liens, contracts,
 16 liabilities, agreements, interest, costs, expenses or losses for any actions that are
 17 or could have been alleged by the named plaintiff or any class member against
 18 Esurance that relate in any way whatsoever to this Action.

19
 20 Settlement Agreement, para. 26.

21 The definition of "Unknown Claims" in the Settlement Agreement is similarly limited
 22 to only the transactions giving rise to the Action, here, for DV payments:

23 "Unknown Claims" means any claims arising out of facts found hereafter to be
 24 other than or different from the facts now believed to be true, relating to any
 25 matter covered by this agreement, as to any of the released claims.

26
 27 Settlement Agreement, para. 33.

28
 OPPOSITION TO MOTION TO POSTPONE
 FINAL APPROVAL OF SETTLEMENT

LOWENBERG, LOPEZ & HANSEN, P.S.
 ATTORNEYS AT LAW
 SUITE 450, RUST BUILDING
 950 PACIFIC AVENUE
 TACOMA, WASHINGTON 98402-4441
 (253) 383-1964 / (253) 838-4993
 (253) 383-1808 FAX

1 Notwithstanding this plain and easily understood language, Ms. Bullis presents two
2 arguments in support of her position that the release is overly broad.

3 First, she argues that the Settlement releases claims including claims which were not
4 asserted in the action, perhaps based upon facts not yet known. This position is clearly
5 untenable, as it is well-established that claims not presented may be included in the release if
6 they are based on the identical factual predicate.
7

8 As the Ninth Circuit has recognized, the "weight of authority holds that a federal court
9 may release not only those claims alleged in the complaint, but also a claim based on
10 the identical factual predicate as that underlying the claims in the settled class action even
11 though the claim was not presented and might not have been presentable in the class action."¹
12 *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1287-88 (9th Cir. 1992) (citations omitted).
13 "[W]here a particular type of relief potentially available to the class members is compromised
14 in the settlement process, it is mainly irrelevant whether or not that relief was specifically
15 requested in the complaint. The breadth of negotiations is not necessarily strictly confined by
16 the pleadings." *Officers for Justice v. Civil Service Com'n of City and County of San*
17 *Francisco*, 688 F.2d 615, 632 n. 18 (9th Cir. 1982).
19

20 Other Circuits are in complete agreement that allowing a broader scope of
21 release "serves the important policy of judicial economy by permitting parties to enter into
22 comprehensive agreements that prevent re-litigation of settled questions at the core of a class
23 action." *In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 261 F.3d 355, 366-67 (3d Cir.
24

25
26 ¹ The release at issue in *City of Seattle* was obviously broader in scope than the one at issue here;
27 here, the release does not extend to matters that "might not have been presentable," but is limited to only
those which "are or could have been" raised. Still, the Ninth Circuit found it valid.

28
OPPOSITION TO MOTION TO POSTPONE
FINAL APPROVAL OF SETTLEMENT

LOWENBERG, LOPEZ & HANSEN, P.S.
ATTORNEYS AT LAW
SUITE 450, RUST BUILDING
950 PACIFIC AVENUE
TACOMA, WASHINGTON 98402-4441
(253) 383-1964 / (253) 838-4993
(253) 383-1808 FAX

2001) (citations omitted); *see also City P'ship Co. v. Atl. Acquisition Ltd. P'ship*, 100 F.3d 1041, 1044 (1st Cir. 1996) (court may permit release of claim based on identical factual predicate; rejecting argument that approval of settlement should be overturned because plaintiff released claims not raised in the complaint). In addition, class action releases may include "claims not presented and even those which could not have been presented as long as the released conduct arises out of the 'identical factual predicate' as the settled conduct." *Wal-Mart Stores, Inc. v. VISA U.S.A., Inc.*, 396 F.3d 96, 107 (2d Cir. 2005). "There is no impropriety in including in a settlement a description of claims that is somewhat broader than those that have been specifically pleaded. In fact, most settling defendants insist on this." *In re Gen. Am. Life Ins. Co. Sales Practices Litig.*, 357 F.3d 800, 805 (8th Cir. 2004).

It is important to note that it is commonplace and permissible in this context for the release to include claims "unknown" to the class. Cases which approved class settlements with releases of known and unknown claims include *In re Prudential Ins. Co. America Sales Practice Litigation Agent Actions*, 148 F.3d 283 (3d Cir. 1998); *Bussie v. Allmerica Financial Corp.*, 50 F. Supp.2d 59 (D. Mass. 1999) and *Varacallo v. Massachusetts Mut. Life Ins. Co.*, 226 F.R.D. 207 (D.N.J. 2005) (rejecting objectors' argument that settlement was not fair because the scope of release was too broad, including claims unknown to the class).

Secondly, Ms. Bullis argues that the release and/or the Notice is faulty because the scope of the release (as pertaining to unknown claims) was not contained in the Notice and, citing no authority, she maintains this "clearly is not fair." A settlement notice is adequate if it fairly apprises members of "the terms of settlement, including the scope of the release." *Wal-Mart Stores Inc. v. VISA U.S.A. Inc.*, *supra* at 124. Based on the notice language she cites,

OPPOSITION TO MOTION TO POSTPONE
FINAL APPROVAL OF SETTLEMENT

LOWENBERG, LOPEZ & HANSEN, P.S.
ATTORNEYS AT LAW
SUITE 450, RUST BUILDING
950 PACIFIC AVENUE
TACOMA, WASHINGTON 98402-4441
(253) 383-1964/ (253) 838-4993
(253) 383-1808 FAX

1 which notifies the class that unless they exclude themselves they would not be able to be a part
 2 of "any other lawsuit against Esurance about the factual and legal issues in this case," it is
 3 difficult to see how class members were not "given sufficient notice and opportunity to object
 4 to the fairness of the release." *TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456, 460
 5 (2d Cir. 1982).

6 Moreover, the Settlement Agreement itself is available for viewing on the website
 7 pertaining to this Action and Settlement. Anyone interested in reading it need only click on the
 8 link.
 9

10 ***C. There is neither merit nor support for the contention that provisions in the Settlement***
 11 ***Agreement violate Rules of Professional Conduct.***

12 Since there were no opt-outs to represent in follow-on cases against Esurance, the
 13 supposed issue under the ABA Model Rules is moot. In another example of Ms. Bullis' "shoot
 14 first, ask questions later" approach, she fails to admit this simple fact – there is no issue here
 15 under the present state of facts. Moreover, a fair reading of the provision at issue and some
 16 basic research would have revealed to Ms. Bullis that on top of being moot, the issue she raises
 17 is baseless under the law. Moreover, despite the Court's request that Ms. Bullis supply an
 18 affidavit or other potentially admissible evidence of her asserted "expert opinion" supporting
 19 her position by January 21, 2010, she has not done so.
 20

21 The interpretation and application of the rules of ethics to the conduct of attorneys
 22 appearing in federal court is controlled by federal law. *See, e.g., Grievance Committee for the*
 23 *Southern District of New York v. Simels*, 48 F.3d 640, 645 (2d Cir.1995) (in interpreting rules
 24 of ethics "well established principles of federalism require that federal courts not be bound by
 25 either the interpretations of state courts or opinions of various bar association committees");
 26

27
 28
 29
 30
 31
 32
 33
 34
 35
 36
 37
 38
 39
 40
 41
 42
 43
 44
 45
 46
 47
 48
 49
 50
 51
 52
 53
 54
 55
 56
 57
 58
 59
 60
 61
 62
 63
 64
 65
 66
 67
 68
 69
 70
 71
 72
 73
 74
 75
 76
 77
 78
 79
 80
 81
 82
 83
 84
 85
 86
 87
 88
 89
 90
 91
 92
 93
 94
 95
 96
 97
 98
 99
 100
 101
 102
 103
 104
 105
 106
 107
 108
 109
 110
 111
 112
 113
 114
 115
 116
 117
 118
 119
 120
 121
 122
 123
 124
 125
 126
 127
 128
 129
 130
 131
 132
 133
 134
 135
 136
 137
 138
 139
 140
 141
 142
 143
 144
 145
 146
 147
 148
 149
 150
 151
 152
 153
 154
 155
 156
 157
 158
 159
 160
 161
 162
 163
 164
 165
 166
 167
 168
 169
 170
 171
 172
 173
 174
 175
 176
 177
 178
 179
 180
 181
 182
 183
 184
 185
 186
 187
 188
 189
 190
 191
 192
 193
 194
 195
 196
 197
 198
 199
 200
 201
 202
 203
 204
 205
 206
 207
 208
 209
 210
 211
 212
 213
 214
 215
 216
 217
 218
 219
 220
 221
 222
 223
 224
 225
 226
 227
 228
 229
 230
 231
 232
 233
 234
 235
 236
 237
 238
 239
 240
 241
 242
 243
 244
 245
 246
 247
 248
 249
 250
 251
 252
 253
 254
 255
 256
 257
 258
 259
 260
 261
 262
 263
 264
 265
 266
 267
 268
 269
 270
 271
 272
 273
 274
 275
 276
 277
 278
 279
 280
 281
 282
 283
 284
 285
 286
 287
 288
 289
 290
 291
 292
 293
 294
 295
 296
 297
 298
 299
 300
 301
 302
 303
 304
 305
 306
 307
 308
 309
 310
 311
 312
 313
 314
 315
 316
 317
 318
 319
 320
 321
 322
 323
 324
 325
 326
 327
 328
 329
 330
 331
 332
 333
 334
 335
 336
 337
 338
 339
 340
 341
 342
 343
 344
 345
 346
 347
 348
 349
 350
 351
 352
 353
 354
 355
 356
 357
 358
 359
 360
 361
 362
 363
 364
 365
 366
 367
 368
 369
 370
 371
 372
 373
 374
 375
 376
 377
 378
 379
 380
 381
 382
 383
 384
 385
 386
 387
 388
 389
 390
 391
 392
 393
 394
 395
 396
 397
 398
 399
 400
 401
 402
 403
 404
 405
 406
 407
 408
 409
 410
 411
 412
 413
 414
 415
 416
 417
 418
 419
 420
 421
 422
 423
 424
 425
 426
 427
 428
 429
 430
 431
 432
 433
 434
 435
 436
 437
 438
 439
 440
 441
 442
 443
 444
 445
 446
 447
 448
 449
 450
 451
 452
 453
 454
 455
 456
 457
 458
 459
 460
 461
 462
 463
 464
 465
 466
 467
 468
 469
 470
 471
 472
 473
 474
 475
 476
 477
 478
 479
 480
 481
 482
 483
 484
 485
 486
 487
 488
 489
 490
 491
 492
 493
 494
 495
 496
 497
 498
 499
 500
 501
 502
 503
 504
 505
 506
 507
 508
 509
 510
 511
 512
 513
 514
 515
 516
 517
 518
 519
 520
 521
 522
 523
 524
 525
 526
 527
 528
 529
 530
 531
 532
 533
 534
 535
 536
 537
 538
 539
 540
 541
 542
 543
 544
 545
 546
 547
 548
 549
 550
 551
 552
 553
 554
 555
 556
 557
 558
 559
 560
 561
 562
 563
 564
 565
 566
 567
 568
 569
 570
 571
 572
 573
 574
 575
 576
 577
 578
 579
 580
 581
 582
 583
 584
 585
 586
 587
 588
 589
 590
 591
 592
 593
 594
 595
 596
 597
 598
 599
 600
 601
 602
 603
 604
 605
 606
 607
 608
 609
 610
 611
 612
 613
 614
 615
 616
 617
 618
 619
 620
 621
 622
 623
 624
 625
 626
 627
 628
 629
 630
 631
 632
 633
 634
 635
 636
 637
 638
 639
 640
 641
 642
 643
 644
 645
 646
 647
 648
 649
 650
 651
 652
 653
 654
 655
 656
 657
 658
 659
 660
 661
 662
 663
 664
 665
 666
 667
 668
 669
 670
 671
 672
 673
 674
 675
 676
 677
 678
 679
 680
 681
 682
 683
 684
 685
 686
 687
 688
 689
 690
 691
 692
 693
 694
 695
 696
 697
 698
 699
 700
 701
 702
 703
 704
 705
 706
 707
 708
 709
 710
 711
 712
 713
 714
 715
 716
 717
 718
 719
 720
 721
 722
 723
 724
 725
 726
 727
 728
 729
 730
 731
 732
 733
 734
 735
 736
 737
 738
 739
 740
 741
 742
 743
 744
 745
 746
 747
 748
 749
 750
 751
 752
 753
 754
 755
 756
 757
 758
 759
 760
 761
 762
 763
 764
 765
 766
 767
 768
 769
 770
 771
 772
 773
 774
 775
 776
 777
 778
 779
 780
 781
 782
 783
 784
 785
 786
 787
 788
 789
 790
 791
 792
 793
 794
 795
 796
 797
 798
 799
 800
 801
 802
 803
 804
 805
 806
 807
 808
 809
 810
 811
 812
 813
 814
 815
 816
 817
 818
 819
 820
 821
 822
 823
 824
 825
 826
 827
 828
 829
 830
 831
 832
 833
 834
 835
 836
 837
 838
 839
 840
 841
 842
 843
 844
 845
 846
 847
 848
 849
 850
 851
 852
 853
 854
 855
 856
 857
 858
 859
 860
 861
 862
 863
 864
 865
 866
 867
 868
 869
 870
 871
 872
 873
 874
 875
 876
 877
 878
 879
 880
 881
 882
 883
 884
 885
 886
 887
 888
 889
 890
 891
 892
 893
 894
 895
 896
 897
 898
 899
 900
 901
 902
 903
 904
 905
 906
 907
 908
 909
 910
 911
 912
 913
 914
 915
 916
 917
 918
 919
 920
 921
 922
 923
 924
 925
 926
 927
 928
 929
 930
 931
 932
 933
 934
 935
 936
 937
 938
 939
 940
 941
 942
 943
 944
 945
 946
 947
 948
 949
 950
 951
 952
 953
 954
 955
 956
 957
 958
 959
 960
 961
 962
 963
 964
 965
 966
 967
 968
 969
 970
 971
 972
 973
 974
 975
 976
 977
 978
 979
 980
 981
 982
 983
 984
 985
 986
 987
 988
 989
 990
 991
 992
 993
 994
 995
 996
 997
 998
 999
 1000

LOWENBERG, LOPEZ & HANSEN, P.S.
 ATTORNEYS AT LAW
 SUITE 450, RUST BUILDING
 950 PACIFIC AVENUE
 TACOMA, WASHINGTON 98402-4441
 (253) 383-1964/ (253) 838-4993
 (253) 383-1808 FAX

1 *Polycast Technology Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621, 624 (S.D.N.Y.1990) ("Federal
 2 law governs the conduct of attorneys in the federal courts."); *Suffolk v. Long Island Lighting*
 3 *Co.*, 710 F.Supp. 1407, 1413 (E.D.N.Y.1989) ("A federal court is not bound to enforce New
 4 York's view of what constitutes ethical professional conduct").

5 The "sparse case law interpreting" ABA Model Rule 5.6(b) "suggests a judicial
 6 reluctance to interpret these rules as a bar to restrictive covenants in settlement agreements."
 7 *Blue Cross and Blue Shield of New Jersey v. Philip Morris, Inc.*, 53 F.Supp.2d 338, 343
 8 (E.D.N.Y.1999).

9 The annotated comments to ABA Model Rule 5.6(b) provide as follows:
 10

11 In settling their client's cases, lawyers may not restrict their own *future*
 12 employment. In other words, a plaintiff's lawyer is not allowed to promise not
 13 to represent anyone else with similar claims against the defendant, and the
 14 defendant is not allowed to ask:
 15

16 First, permitting such agreements restricts the access of the public
 17 to lawyers who, by virtue of their background experience, might
 18 be the very best available talent to represent these individuals . . .

19 Second, the use of such agreements may provide clients with
 20 rewards that bear less relationship to the merits of their claims
 21 than they do to the desire of the defendant to "buy off" plaintiff's
 22 counsel. Third, the offering of such restrictive agreements places
 23 the plaintiff's lawyer in a situation where there is conflict
 24 between the interests of present clients and those of *future* clients.
 25

26 (Emphasis added).

27
 28 OPPOSITION TO MOTION TO POSTPONE
 FINAL APPROVAL OF SETTLEMENT

LOWENBERG, LOPEZ & HANSEN, P.S.
 ATTORNEYS AT LAW
 SUITE 450, RUST BUILDING
 950 PACIFIC AVENUE
 TACOMA, WASHINGTON 98402-4441
 (253) 383-1964/ (253) 838-4993
 (253) 383-1808 FAX

1 The above demonstrates the concerns pertain solely to restrictions against *future* employment,
 2 the word "future" being the operative word.

3 Federal decisions concerning this rule are few. In a case from the New York Court of
 4 Appeals (whose interpretations of ethical rules do not bind this court, but are nevertheless an
 5 appropriate source of guidance), stated in interpreting the equivalent state rule: "The type of
 6 restriction that violates DR 2-108(B) is one that *completely prohibits the lawyer from*
 7 *representing clients* and thus offends the right of members of the public to select and repose
 8 confidence in lawyers of their choice without restriction by providing full availability of legal
 9 counsel." *Cohen v. Lord, Day & Lord*, 75 N.Y.2d 95, 106 n. 2, 550 N.E.2d 410, 416, 551
 10 N.Y.S.2d 157, 163 (1989) (citation and internal quotation marks omitted) (emphasis added).
 11

12 In this case there are no such restrictions. The provision in controversy was designed
 13 for the express purpose of *prohibiting* a conflict of interest created by class counsel
 14 encouraging members of the class to opt out and then representing opt-outs against the
 15 Defendant in this matter. The provision pertains only to those class members who would elect
 16 to opt-out from the class, and not to undefined or unknown *future* clients. There are no opt-
 17 outs in this case.
 18

19 Nothing within the language prohibits representation of *future* clients against the
 20 defendant. Moreover, the express language of the agreement expressly nullifies any restriction
 21 that would violate the Rules of Professional Conduct. In other words, any prohibition that
 22 would violate the RPC's or ethical rules is unenforceable. Ms. Bullis' contention that an
 23 improper motive should be attached to the language which indicates that the provision is *not*
 24 enforceable to the extent it would conflict with a rule is misplaced - to the contrary, the
 25
 26
 27

28
 29
 30
 31
 32
 33
 34
 35
 36
 37
 38
 39
 40
 41
 42
 43
 44
 45
 46
 47
 48
 49
 50
 51
 52
 53
 54
 55
 56
 57
 58
 59
 60
 61
 62
 63
 64
 65
 66
 67
 68
 69
 70
 71
 72
 73
 74
 75
 76
 77
 78
 79
 80
 81
 82
 83
 84
 85
 86
 87
 88
 89
 90
 91
 92
 93
 94
 95
 96
 97
 98
 99
 100
 101
 102
 103
 104
 105
 106
 107
 108
 109
 110
 111
 112
 113
 114
 115
 116
 117
 118
 119
 120
 121
 122
 123
 124
 125
 126
 127
 128
 129
 130
 131
 132
 133
 134
 135
 136
 137
 138
 139
 140
 141
 142
 143
 144
 145
 146
 147
 148
 149
 150
 151
 152
 153
 154
 155
 156
 157
 158
 159
 160
 161
 162
 163
 164
 165
 166
 167
 168
 169
 170
 171
 172
 173
 174
 175
 176
 177
 178
 179
 180
 181
 182
 183
 184
 185
 186
 187
 188
 189
 190
 191
 192
 193
 194
 195
 196
 197
 198
 199
 200
 201
 202
 203
 204
 205
 206
 207
 208
 209
 210
 211
 212
 213
 214
 215
 216
 217
 218
 219
 220
 221
 222
 223
 224
 225
 226
 227
 228
 229
 230
 231
 232
 233
 234
 235
 236
 237
 238
 239
 240
 241
 242
 243
 244
 245
 246
 247
 248
 249
 250
 251
 252
 253
 254
 255
 256
 257
 258
 259
 260
 261
 262
 263
 264
 265
 266
 267
 268
 269
 270
 271
 272
 273
 274
 275
 276
 277
 278
 279
 280
 281
 282
 283
 284
 285
 286
 287
 288
 289
 290
 291
 292
 293
 294
 295
 296
 297
 298
 299
 300
 301
 302
 303
 304
 305
 306
 307
 308
 309
 310
 311
 312
 313
 314
 315
 316
 317
 318
 319
 320
 321
 322
 323
 324
 325
 326
 327
 328
 329
 330
 331
 332
 333
 334
 335
 336
 337
 338
 339
 340
 341
 342
 343
 344
 345
 346
 347
 348
 349
 350
 351
 352
 353
 354
 355
 356
 357
 358
 359
 360
 361
 362
 363
 364
 365
 366
 367
 368
 369
 370
 371
 372
 373
 374
 375
 376
 377
 378
 379
 380
 381
 382
 383
 384
 385
 386
 387
 388
 389
 390
 391
 392
 393
 394
 395
 396
 397
 398
 399
 400
 401
 402
 403
 404
 405
 406
 407
 408
 409
 410
 411
 412
 413
 414
 415
 416
 417
 418
 419
 420
 421
 422
 423
 424
 425
 426
 427
 428
 429
 430
 431
 432
 433
 434
 435
 436
 437
 438
 439
 440
 441
 442
 443
 444
 445
 446
 447
 448
 449
 450
 451
 452
 453
 454
 455
 456
 457
 458
 459
 460
 461
 462
 463
 464
 465
 466
 467
 468
 469
 470
 471
 472
 473
 474
 475
 476
 477
 478
 479
 480
 481
 482
 483
 484
 485
 486
 487
 488
 489
 490
 491
 492
 493
 494
 495
 496
 497
 498
 499
 500
 501
 502
 503
 504
 505
 506
 507
 508
 509
 510
 511
 512
 513
 514
 515
 516
 517
 518
 519
 520
 521
 522
 523
 524
 525
 526
 527
 528
 529
 530
 531
 532
 533
 534
 535
 536
 537
 538
 539
 540
 541
 542
 543
 544
 545
 546
 547
 548
 549
 550
 551
 552
 553
 554
 555
 556
 557
 558
 559
 560
 561
 562
 563
 564
 565
 566
 567
 568
 569
 570
 571
 572
 573
 574
 575
 576
 577
 578
 579
 580
 581
 582
 583
 584
 585
 586
 587
 588
 589
 590
 591
 592
 593
 594
 595
 596
 597
 598
 599
 600
 601
 602
 603
 604
 605
 606
 607
 608
 609
 610
 611
 612
 613
 614
 615
 616
 617
 618
 619
 620
 621
 622
 623
 624
 625
 626
 627
 628
 629
 630
 631
 632
 633
 634
 635
 636
 637
 638
 639
 640
 641
 642
 643
 644
 645
 646
 647
 648
 649
 650
 651
 652
 653
 654
 655
 656
 657
 658
 659
 660
 661
 662
 663
 664
 665
 666
 667
 668
 669
 670
 671
 672
 673
 674
 675
 676
 677
 678
 679
 680
 681
 682
 683
 684
 685
 686
 687
 688
 689
 690
 691
 692
 693
 694
 695
 696
 697
 698
 699
 700
 701
 702
 703
 704
 705
 706
 707
 708
 709
 710
 711
 712
 713
 714
 715
 716
 717
 718
 719
 720
 721
 722
 723
 724
 725
 726
 727
 728
 729
 730
 731
 732
 733
 734
 735
 736
 737
 738
 739
 740
 741
 742
 743
 744
 745
 746
 747
 748
 749
 750
 751
 752
 753
 754
 755
 756
 757
 758
 759
 760
 761
 762
 763
 764
 765
 766
 767
 768
 769
 770
 771
 772
 773
 774
 775
 776
 777
 778
 779
 780
 781
 782
 783
 784
 785
 786
 787
 788
 789
 790
 791
 792
 793
 794
 795
 796
 797
 798
 799
 800
 801
 802
 803
 804
 805
 806
 807
 808
 809
 810
 811
 812
 813
 814
 815
 816
 817
 818
 819
 820
 821
 822
 823
 824
 825
 826
 827
 828
 829
 830
 831
 832
 833
 834
 835
 836
 837
 838
 839
 840
 841
 842
 843
 844
 845
 846
 847
 848
 849
 850
 851
 852
 853
 854
 855
 856
 857
 858
 859
 860
 861
 862
 863
 864
 865
 866
 867
 868
 869
 870
 871
 872
 873
 874
 875
 876
 877
 878
 879
 880
 881
 882
 883
 884
 885
 886
 887
 888
 889
 890
 891
 892
 893
 894
 895
 896
 897
 898
 899
 900
 901
 902
 903
 904
 905
 906
 907
 908
 909
 910
 911
 912
 913
 914
 915
 916
 917
 918
 919
 920
 921
 922
 923
 924
 925
 926
 927
 928
 929
 930
 931
 932
 933
 934
 935
 936
 937
 938
 939
 940
 941
 942
 943
 944
 945
 946
 947
 948
 949
 950
 951
 952
 953
 954
 955
 956
 957
 958
 959
 960
 961
 962
 963
 964
 965
 966
 967
 968
 969
 970
 971
 972
 973
 974
 975
 976
 977
 978
 979
 980
 981
 982
 983
 984
 985
 986
 987
 988
 989
 990
 991
 992
 993
 994
 995
 996
 997
 998
 999
 1000

LOWENBERG, LOPEZ & HANSEN, P.S.
 ATTORNEYS AT LAW
 SUITE 450, RUST BUILDING
 950 PACIFIC AVENUE
 TACOMA, WASHINGTON 98402-4441
 (253) 383-1964/ (253) 838-4993
 (253) 383-1808 FAX

1 language was designed and included to avoid the type of situation that the Rule is designed to
 2 prohibit.

3 The most analogous federal decision analyzing Model Rule 5.6(b) found that provisions
 4 of a settlement agreement requiring class counsel to advise future claimants against filing
 5 certain claims falling short of certain medical criteria did not violate the rule because counsel
 6 did not intend these provisions to create a binding obligation on their part to refrain from
 7 representing clients who did not meet these criteria but wished to sue the defendant. *Georgine*
 8 *v. Amchem Products, Inc.*, 157 F.R.D. 246 (E.D.Pa.1994), *rev'd on other grounds*, 83 F.3d 610
 9 (3d Cir.1996), *aff'd sub nom., Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct.
 10 2231, 138 L.Ed.2d 689 (1997). In this case, there is no intention (or obligation) on the part of
 11 class counsel to engage in future conduct that would violate ethical rules. The provision only
 12 acknowledges the obvious – counsel were not to try to undercut the very settlement they
 13 presented to the Court as “fair, reasonable and adequate” by then encouraging opt-outs.
 14

15
 16 ***D. There is no merit to the contention that Class Counsel should have asserted “bad faith”***
 17 ***claims; they added no appreciable value to the settlement.***

18 For the reasons stated at oral argument and in the briefing in support of Final Approval,
 19 it is uncontested that the average pay-out under the settlement, \$283 per claim, is “fair,
 20 reasonable and adequate.” Ms. Bullis complains, however, that additional claims should have
 21 been asserted under the Washington Consumer Protection Act and added value to the Class
 22 claims settled. As the Court noted, however, settlement values reflect the totality of
 23 circumstances then in effect, including not only individual potential recoveries, but also the
 24 likelihood of success on the merits and, importantly, the ability to resolve the case without
 25
 26
 27

28
 29
 30
 31
 32
 33
 34
 35
 36
 37
 38
 39
 40
 41
 42
 43
 44
 45
 46
 47
 48
 49
 50
 51
 52
 53
 54
 55
 56
 57
 58
 59
 60
 61
 62
 63
 64
 65
 66
 67
 68
 69
 70
 71
 72
 73
 74
 75
 76
 77
 78
 79
 80
 81
 82
 83
 84
 85
 86
 87
 88
 89
 90
 91
 92
 93
 94
 95
 96
 97
 98
 99
 100
 101
 102
 103
 104
 105
 106
 107
 108
 109
 110
 111
 112
 113
 114
 115
 116
 117
 118
 119
 120
 121
 122
 123
 124
 125
 126
 127
 128
 129
 130
 131
 132
 133
 134
 135
 136
 137
 138
 139
 140
 141
 142
 143
 144
 145
 146
 147
 148
 149
 150
 151
 152
 153
 154
 155
 156
 157
 158
 159
 160
 161
 162
 163
 164
 165
 166
 167
 168
 169
 170
 171
 172
 173
 174
 175
 176
 177
 178
 179
 180
 181
 182
 183
 184
 185
 186
 187
 188
 189
 190
 191
 192
 193
 194
 195
 196
 197
 198
 199
 200
 201
 202
 203
 204
 205
 206
 207
 208
 209
 210
 211
 212
 213
 214
 215
 216
 217
 218
 219
 220
 221
 222
 223
 224
 225
 226
 227
 228
 229
 230
 231
 232
 233
 234
 235
 236
 237
 238
 239
 240
 241
 242
 243
 244
 245
 246
 247
 248
 249
 250
 251
 252
 253
 254
 255
 256
 257
 258
 259
 260
 261
 262
 263
 264
 265
 266
 267
 268
 269
 270
 271
 272
 273
 274
 275
 276
 277
 278
 279
 280
 281
 282
 283
 284
 285
 286
 287
 288
 289
 290
 291
 292
 293
 294
 295
 296
 297
 298
 299
 300
 301
 302
 303
 304
 305
 306
 307
 308
 309
 310
 311
 312
 313
 314
 315
 316
 317
 318
 319
 320
 321
 322
 323
 324
 325
 326
 327
 328
 329
 330
 331
 332
 333
 334
 335
 336
 337
 338
 339
 340
 341
 342
 343
 344
 345
 346
 347
 348
 349
 350
 351
 352
 353
 354
 355
 356
 357
 358
 359
 360
 361
 362
 363
 364
 365
 366
 367
 368
 369
 370
 371
 372
 373
 374
 375
 376
 377
 378
 379
 380
 381
 382
 383
 384
 385
 386
 387
 388
 389
 390
 391
 392
 393
 394
 395
 396
 397
 398
 399
 400
 401
 402
 403
 404
 405
 406
 407
 408
 409
 410
 411
 412
 413
 414
 415
 416
 417
 418
 419
 420
 421
 422
 423
 424
 425
 426
 427
 428
 429
 430
 431
 432
 433
 434
 435
 436
 437
 438
 439
 440
 441
 442
 443
 444
 445
 446
 447
 448
 449
 450
 451
 452
 453
 454
 455
 456
 457
 458
 459
 460
 461
 462
 463
 464
 465
 466
 467
 468
 469
 470
 471
 472
 473
 474
 475
 476
 477
 478
 479
 480
 481
 482
 483
 484
 485
 486
 487
 488
 489
 490
 491
 492
 493
 494
 495
 496
 497
 498
 499
 500
 501
 502
 503
 504
 505
 506
 507
 508
 509
 510
 511
 512
 513
 514
 515
 516
 517
 518
 519
 520
 521
 522
 523
 524
 525
 526
 527
 528
 529
 530
 531
 532
 533
 534
 535
 536
 537
 538
 539
 540
 541
 542
 543
 544
 545
 546
 547
 548
 549
 550
 551
 552
 553
 554
 555
 556
 557
 558
 559
 560
 561
 562
 563
 564
 565
 566
 567
 568
 569
 570
 571
 572
 573
 574
 575
 576
 577
 578
 579
 580
 581
 582
 583
 584
 585
 586
 587
 588
 589
 590
 591
 592
 593
 594
 595
 596
 597
 598
 599
 600
 601
 602
 603
 604
 605
 606
 607
 608
 609
 610
 611
 612
 613
 614
 615
 616
 617
 618
 619
 620
 621
 622
 623
 624
 625
 626
 627
 628
 629
 630
 631
 632
 633
 634
 635
 636
 637
 638
 639
 640
 641
 642
 643
 644
 645
 646
 647
 648
 649
 650
 651
 652
 653
 654
 655
 656
 657
 658
 659
 660
 661
 662
 663
 664
 665
 666
 667
 668
 669
 670
 671
 672
 673
 674
 675
 676
 677
 678
 679
 680
 681
 682
 683
 684
 685
 686
 687
 688
 689
 690
 691
 692
 693
 694
 695
 696
 697
 698
 699
 700
 701
 702
 703
 704
 705
 706
 707
 708
 709
 710
 711
 712
 713
 714
 715
 716
 717
 718
 719
 720
 721
 722
 723
 724
 725
 726
 727
 728
 729
 730
 731
 732
 733
 734
 735
 736
 737
 738
 739
 740
 741
 742
 743
 744
 745
 746
 747
 748
 749
 750
 751
 752
 753
 754
 755
 756
 757
 758
 759
 760
 761
 762
 763
 764
 765
 766
 767
 768
 769
 770
 771
 772
 773
 774
 775
 776
 777
 778
 779
 780
 781
 782
 783
 784
 785
 786
 787
 788
 789
 790
 791
 792
 793
 794
 795
 796
 797
 798
 799
 800
 801
 802
 803
 804
 805
 806
 807
 808
 809
 810
 811
 812
 813
 814
 815
 816
 817
 818
 819
 820
 821
 822
 823
 824
 825
 826
 827
 828
 829
 830
 831
 832
 833
 834
 835
 836
 837
 838
 839
 840
 841
 842
 843
 844
 845
 846
 847
 848
 849
 850
 851
 852
 853
 854
 855
 856
 857
 858
 859
 860
 861
 862
 863
 864
 865
 866
 867
 868
 869
 870
 871
 872
 873
 874
 875
 876
 877
 878
 879
 880
 881
 882
 883
 884
 885
 886
 887
 888
 889
 890
 891
 892
 893
 894
 895
 896
 897
 898
 899
 900
 901
 902
 903
 904
 905
 906
 907
 908
 909
 910
 911
 912
 913
 914
 915
 916
 917
 918
 919
 920
 921
 922
 923
 924
 925
 926
 927
 928
 929
 930
 931
 932
 933
 934
 935
 936
 937
 938
 939
 940
 941
 942
 943
 944
 945
 946
 947
 948
 949
 950
 951
 952
 953
 954
 955
 956
 957
 958
 959
 960
 961
 962
 963
 964
 965
 966
 967
 968
 969
 970
 971
 972
 973
 974
 975
 976
 977
 978
 979
 980
 981
 982
 983
 984
 985
 986
 987
 988
 989
 990
 991
 992
 993
 994
 995
 996
 997
 998
 999
 1000

LOWENBERG, LOPEZ & HANSEN, P.S.
 ATTORNEYS AT LAW
 SUITE 450, RUST BUILDING
 950 PACIFIC AVENUE
 TACOMA, WASHINGTON 98402-4441
 (253) 383-1964 / (253) 838-4993
 (253) 383-1808 FAX

1 prolonged, expensive litigation and provide payment to Class Members now, not years from
2 now.

3 There are considerable obstacles to the certification of a nationwide class alleging false
4 or deceptive practices in claims handling under the Washington consumer protection
5 statute. State consumer protection laws "vary considerably, and courts must respect these
6 differences rather than apply one state's laws to sales in other states with different rules."² *In re*
7 *Bridgestone/Firestone Inc.*, 288 F.3d 1012, 1020 (7th Cir. 2002). Moreover, consumer fraud
8 laws of the states "differ with regard to the defendant's state of mind, type of prohibited
9 conduct, proof of injury-in-fact, available remedies, and reliance, just to name a few." *In re*
10 *Prempro*, 230 F.R.D. 555, 564 (E.D. Ark. 2005). As a result, a court obliged to apply the laws
11 of all fifty states would find individual questions to overwhelm any common questions. *In re*
12 *Rezulin Products Liability Litig.*, 210 F.R.D. 61, 68 (S.D.N.Y. 2002).

13 In the end, a "nationwide class alleging violations of the laws of multiple jurisdictions
14 would likely require at least one representative plaintiff from each jurisdiction" to meet
15 the adequacy requirements of Fed. R. Civ. P. 23(a), when it comes time for the motion for class
16 certification. *Whitson v. Bumbo*, 2009 WL 1515597 (N.D. Cal. Apr. 16, 2009) (dismissing
17 causes of action framed as nationwide class allegations of violation of each states' respective
18 consumer protection laws).

19 Just yesterday, moreover, the Washington Supreme Court published its opinion in
20 *Schnall v. AT&T*, Case No. 80572-5, appeal from King County Superior Court Case No. 02-2-

21
22
23
24
25
26 ² This is not necessarily true of claims based on form contracts. See *Flanagan v. Allstate Ins. Co.*,
27 242 F.R.D. 421, 428 (N.D. Ill. 2007); *Universal Serv. Tel. Billing Practices Litig.*, 219 F.R.D. 661, 667
(D. Kan. 2004).

28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300
301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
340
341
342
343
344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384
385
386
387
388
389
390
391
392
393
394
395
396
397
398
399
400
401
402
403
404
405
406
407
408
409
410
411
412
413
414
415
416
417
418
419
420
421
422
423
424
425
426
427
428
429
430
431
432
433
434
435
436
437
438
439
440
441
442
443
444
445
446
447
448
449
450
451
452
453
454
455
456
457
458
459
460
461
462
463
464
465
466
467
468
469
470
471
472
473
474
475
476
477
478
479
480
481
482
483
484
485
486
487
488
489
490
491
492
493
494
495
496
497
498
499
500
501
502
503
504
505
506
507
508
509
510
511
512
513
514
515
516
517
518
519
520
521
522
523
524
525
526
527
528
529
530
531
532
533
534
535
536
537
538
539
540
541
542
543
544
545
546
547
548
549
550
551
552
553
554
555
556
557
558
559
560
561
562
563
564
565
566
567
568
569
570
571
572
573
574
575
576
577
578
579
580
581
582
583
584
585
586
587
588
589
590
591
592
593
594
595
596
597
598
599
600
601
602
603
604
605
606
607
608
609
610
611
612
613
614
615
616
617
618
619
620
621
622
623
624
625
626
627
628
629
630
631
632
633
634
635
636
637
638
639
640
641
642
643
644
645
646
647
648
649
650
651
652
653
654
655
656
657
658
659
660
661
662
663
664
665
666
667
668
669
670
671
672
673
674
675
676
677
678
679
680
681
682
683
684
685
686
687
688
689
690
691
692
693
694
695
696
697
698
699
700
701
702
703
704
705
706
707
708
709
710
711
712
713
714
715
716
717
718
719
720
721
722
723
724
725
726
727
728
729
730
731
732
733
734
735
736
737
738
739
740
741
742
743
744
745
746
747
748
749
750
751
752
753
754
755
756
757
758
759
760
761
762
763
764
765
766
767
768
769
770
771
772
773
774
775
776
777
778
779
780
781
782
783
784
785
786
787
788
789
790
791
792
793
794
795
796
797
798
799
800
801
802
803
804
805
806
807
808
809
810
811
812
813
814
815
816
817
818
819
820
821
822
823
824
825
826
827
828
829
830
831
832
833
834
835
836
837
838
839
840
841
842
843
844
845
846
847
848
849
850
851
852
853
854
855
856
857
858
859
860
861
862
863
864
865
866
867
868
869
870
871
872
873
874
875
876
877
878
879
880
881
882
883
884
885
886
887
888
889
890
891
892
893
894
895
896
897
898
899
900
901
902
903
904
905
906
907
908
909
910
911
912
913
914
915
916
917
918
919
920
921
922
923
924
925
926
927
928
929
930
931
932
933
934
935
936
937
938
939
940
941
942
943
944
945
946
947
948
949
950
951
952
953
954
955
956
957
958
959
960
961
962
963
964
965
966
967
968
969
970
971
972
973
974
975
976
977
978
979
980
981
982
983
984
985
986
987
988
989
990
991
992
993
994
995
996
997
998
999
1000

LOWENBERG, LOPEZ & HANSEN, P.S.
ATTORNEYS AT LAW
SUITE 450, RUST BUILDING
950 PACIFIC AVENUE
TACOMA, WASHINGTON 98402-4441
(253) 383-1964/ (253) 838-4993
(253) 383-1808 FAX

05776-4 (Hon. Douglas A. North), in which it held that the Washington Consumer Protection Act could not be extended to claims arising in other states. *See* Slip op. at 15 (“nothing in our law indicates that CPA claims by nonresidents for acts occurring outside of Washington can be entertained under the statute”).³ The *Schnall* Court concluded that a nationwide class action should not be certified under the Washington CPA. *See* Slip op. at 22 (Washington need not apply its Consumer Protection Act “to citizens of other states in order to protect the interests of citizens of Washington. A nationwide class would be unmanageable and unduly burdensome on the trial court and the state judicial system and serve no real benefit to plaintiffs who are free to bring statewide class actions in their home states.”).

The *Schall* ruling applies with even greater force here. In that case, the Washington Supreme Court declined to extend the reach of the state’s Consumer Protection Act extra-territorially against a corporation domiciled in this State. Esurance is not a Washington domiciliary, so applying its Consumer Protection Act would be even more problematic. There is no appreciable “added value” for asserting such claims.⁴

E. *There are no tax consequences concerning payment of an award of damages for damage to a capital asset.*

Ms. Bullis has raised concerns that payment of damages to class members for diminution of value to their vehicles could result in such damages being categorized as

³ available at:
<http://www.courts.wa.gov/opinions/index.cfm?fa=opinions.showOpinion&filename=805725MAJ>.
 Copy attached as Exhibit 4.

⁴ The same is not necessarily true, however, of the certifiability of a nationwide breach of contract class with form contracts all containing essentially the same operative language and lacking the choice of law provisions which drove the findings in *Schnall*.

OPPOSITION TO MOTION TO POSTPONE
 FINAL APPROVAL OF SETTLEMENT

LOWENBERG, LOPEZ & HANSEN, P.S.
 ATTORNEYS AT LAW
 SUITE 450, RUST BUILDING
 950 PACIFIC AVENUE
 TACOMA, WASHINGTON 98402-4441
 (253) 383-1964/ (253) 838-4993
 (253) 383-1808 FAX

1 “ordinary income” for tax purposes. Again, thoughtful consideration of the issue and basic
2 research would have quelled any such concern, as it is groundless in law and fact.

3 If a recovery compensates solely for damages to capital assets, the recovery will be
4 treated as capital. Thus, it would produce a capital gain or would reduce the taxpayer's capital
5 loss, depending upon the taxpayer's basis in the asset. See 47 AM. JUR. Trials § 591; and
6 *Marcalus Manufacturing Co., Inc. v. Commissioner*, 30 T.C. 1345, 1354 (1958)(no gain [i.e.,
7 income] was realized because the amount received to compensate taxpayer for damaged asset
8 did not exceed the adjusted basis of the property immediately prior to the involuntary
9 conversion.) In this case, the *only* way payment of any settlement could result in a taxable
10 consequence is if the settlement payment (\$283 on average) exceeded the class member's basis
11 (i.e., the purchase price) in the automobile.
12

13 In determining whether receipts are taxable as ordinary income or as a return of capital,
14 it is immaterial whether taxpayer effected collection amicably or by resolving a dispute through
15 compromise or litigation. “It is the nature of the underlying claim that controls and not the
16 manner of collection.” *Thomson v. Commissioner*, 406 F.2d 1006, 1008 (9th Cir. 1969) (quoting
17 *Spangler v. Commissioner*, 323 F.2d 913, 916 (9th Cir. 1963)). In this case, the “underlying
18 claim” alleged in Plaintiff's Class Action Complaint concerns diminished value claims
19 pertaining to automobiles. There can be no doubt that the claim involves loss in value to a
20 capital asset.
21
22

23 **CONCLUSION**

24 For all of the foregoing reasons, the motion by attorney Alana Bullis, purportedly on
25 filed on behalf of Class Representative Su Shin, should be **DENIED**.
26
27

28
OPPOSITION TO MOTION TO POSTPONE
FINAL APPROVAL OF SETTLEMENT

LOWENBERG, LOPEZ & HANSEN, P.S.
ATTORNEYS AT LAW
SUITE 450, RUST BUILDING
950 PACIFIC AVENUE
TACOMA, WASHINGTON 98402-4441
(253) 383-1964/ (253) 838-4993
(253) 383-1808 FAX

1 RESPECTFULLY SUBMITTED submitted this 22nd day of January, 2010.

2 LOWENBERG, LOPEZ & HANSEN, PS

3 STEPHEN M, HANSEN, WSBA # 15642

4 Of Attorneys for Plaintiff

5 Debra Brewer Hayes
6 REICH & BINSTOCK
7 4265 San Felipe, Suite 1000
8 Houston, TX 77027
9 Telephone: (713) 622-7271
Fax: (713) 623-8724
dhayes@dhayeslaw.com

10 Elaine A. Ryan
11 Patricia N. Syverson
12 BONNETT, FAIRBOURN, FRIEDMAN
13 & BALINT, P.C.
14 2901 N. Central Ave., Suite 1000
15 Phoenix, AZ 85012
16 Telephone: (602) 274-1100
17 Fax: (602) 798-5825

18 Van Bunch
19 BONNETT, FAIRBOURN, FRIEDMAN
20 & BALINT, P.C.
21 57 Carriage Hill
22 Signal Mountain, Tennessee 37377
23 Telephone: (423) 886-9736

24 David A. Futscher
25 PARRY DEERING FUTSCHER
26 & SPARKS, PSC
27 411 Garrard Street, P.O. Box 2618
28 Covington, KY 41012-2618
Telephone: (859) 291-9000
Fax: (859) 291-9300
dfutscher@pdfslaw.com

OPPOSITION TO MOTION TO POSTPONE
FINAL APPROVAL OF SETTLEMENT

LOWENBERG, LOPEZ & HANSEN, P.S.
ATTORNEYS AT LAW
SUITE 450, RUST BUILDING
950 PACIFIC AVENUE
TACOMA, WASHINGTON 98402-4441
(253) 383-1964 / (253) 838-4993
(253) 383-1808 FAX